APPENDIX I

Opinion of Court Below

IN THE UNITED STATES COURT OF CLAIMS

No. 477-55

(Decided July 16, 1958)

EUGENE J. ARNFELD AND HENRY J. MOSES, EXECUTORS OF THE ESTATE OF ANDREW WINEMAN, DECEASED, AND EUGENE J. ARNFELD AND MORTIMER H. MEYER, SUCCESSOR EXECUTORS OF THE ESTATE OF ELSA WINEMAN, DECEASED

v.

THE UNITED STATES

Mr. Joseph H. Sheppard for the plaintiffs. *Messrs. J. Marvin Haynes, Haynes & Miller, N. Barr Miller,* and *Arthur H. Adams* were on the briefs.

Mr. David R. Frazer, with whom was *Mr. Assistant Attorney General Charles K. Rice,* for the defendant. *Mr. James P. Garland* was on the brief.

OPINION

JONES, *Chief Judge,* delivered the opinion of the court:

Plaintiffs, executors of the estates of Andrew and Elsa Wineman, sue to recover income taxes and deficiency interest for the year 1951. The amount claimed is $25,494.25.

The issue presented for our determination is whether the increment realized by taxpayer Elsa Wineman upon the transfer of an annuity contract prior to its maturity constitutes ordinary income or capital gain.

The annuity contract in question was acquired by Andrew Wineman on January 6, 1933, and thereafter was assigned

to his wife, Elsa Wineman, on January 11, 1933. Issued by the Penn Mutual Life Insurance Company, the policy was an 18-year optional deferred income contract, to mature when the insured reached the age of seventy years. Part of the contract consisted of a variable deposit rider which permitted deposits at any time by the insured or his assignees. The aggregate deposited was not to be in excess of $100,000, unless the company should waive such limit. The maturity date of the policy was January 6, 1951.

The contract was purchased by Andrew Wineman from a Howard A. Kaichen who, at the time, held a general agency contract with the Penn Mutual Life Insurance Company. Kaichen represented that company as a general agent from 1932 until 1941 when his contract was terminated. He thereafter had no connection with the Penn Mutual company.

The optional deferred income contract was first called to Andrew Wineman's attention by Kaichen in late 1932. The early depression years had seriously undermined financial conditions in Detroit, Michigan, where Andrew Wineman resided and carried on his business. As a result, those who had invested in stocks, bonds, and real estate began to witness the decline of their property values. To meet the needs of such persons, by way of providing a conservative investment, the Penn Mutual Life Insurance Company, along with other insurance companies, began offering policies of the type purchased by Wineman.

With the coming of the postwar inflationary spiral, however, conservative investments such as reflected in the optional deferred income contract became less attractive than other investments. For that reason, Wineman thought that he had made a poor investment. His misgivings turned to criticism of Kaichen for inducing him to purchase the annuity contract. Because of such criticism, Kaichen finally suggested to Wineman that he sell the policy and use the proceeds to acquire common stock or other more profitable

securities. Kaichen thought it advisable to sell the policy, rather than surrender it to the insurer for its cash surrender value, because he believed that an income tax saving could thereby be realized. His belief concerning the tax consequences of such a transaction was confirmed by Wineman's regularly employed accountants after consultation with their Washington, D. C., office. Briefly, Wineman's accountants informed him that if a bona fide sale of the policy were made, the Treasury Department would treat any profit derived therefrom as long-term capital gain instead of as ordinary income.

Kaichen thereafter suggested that the annuity contract be sold to the National Bank of Detroit, since he had no intention of purchasing it himself. Following this suggestion, Wineman went to the bank on January 3, 1951, accompanied by Kaichen. They were informed by the vice president of the bank that, since the National Bank of Detroit was a national bank, it was precluded by law from making the purchase. The vice president did suggest, however, that the bank would loan Kaichen $117,000, the agreed selling price of the contract, on Kaichen's note with the policy as collateral if he would buy the policy.

On the same day, Elsa Wineman transferred the policy to Kaichen at the agreed price of $117,000. This amount was borrowed from the bank pursuant to the above mentioned agreement, with the policy assigned as collateral.

On January 4, 1951, the National Bank of Detroit mailed the policy to the Penn Mutual Life Insurance Company, along with a letter requesting that the policy's cash surrender value be forwarded to the bank. The following day, January 5, 1951, Kaichen issued his check to Elsa Wineman for $117,000, and thereby satisfied the purchase price of the insurance policy. The cash surrender value of the policy, amounting to $117,330.14, was received by the bank on January 15, 1951. This amount was applied by the bank in payment of Kaichen's loan and the accrued interest thereon.

The balance of $240.77 was then applied to Kaichen's special account.

At the date of acquisition of the annuity contract, January 6, 1933, Andrew Wineman made an initial payment of $10,000. Thereafter, deposits in variable amounts were made by Elsa Wineman. The last deposit was on March 4, 1949. Total payments on the policy aggregated $81,000, which was the cost basis of the contract at the time it was transferred by Elsa Wineman to Howard A. Kaichen.

Taxpayers Andrew and Elsa Wineman filed a joint income tax return for the calendar year 1951. The sum of $36,000, being the difference between the cost of the policy and the $117,000 paid by Howard A. Kaichen for its transfer, was reported in the return as capital gain. Subsequently the Commissioner of Internal Revenue determined that such profit amounted to ordinary income. The additional taxes resulting from this determination were duly paid. Claims for refund were filed and later rejected by the Commissioner.

Eugene J. Arnfeld and Henry J. Moses are the duly appointed executors of the estate of Andrew Wineman, who died in 1954. Elsa Wineman died in 1952. Plaintiffs Eugene J. Arnfeld and Mortimer H. Meyer are the executors of her estate.

The Government initially challenges plaintiffs' contention that the profit realized upon the transfer of the annuity contract prior to maturity constitutes capital gain by denying that the transfer was a bona fide "sale or exchange" of property within the meaning of section 117 (a) (4) of the 1939 Code.[1] The Government's argument that a *bona*

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[1] Internal Revenue Code of 1939:

"§ 117. Capital gains and losses—(a) Definitions.
"As used in this chapter—
"(1) Capital assets.
"The term 'capital assets' means property held by the taxpayer

fide sale or exchange did not take place can be summarized as follows: The transaction was one of accommodation between the National Bank of Detroit, Kaichen, and Andrew Wineman, with the bank and Kaichen acting as agents for Wineman for the purpose of transferring the annuity policy out of Wineman's hands and into the hands of a third party. Thus Kaichen was no more than a conduit through which the "form" of a sale took place.

However, we feel that the broad sweep of this objection, if sanctioned as to the instant facts, could strike at the heart of any sale or exchange. For it is not clear to us just what standards of "horse trading" the Government

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(whether or not connected with his trade or business), but does not include—

"(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

"(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (*l*), or real property used in his trade or business;

"(C) a copyright; a literary, musical, or artistic composition; or similar property; * * *

* * * * *

"(D) an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue.

* * * * *

"(4) Long-term capital gain.

"The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months; if and to the extent such gain is taken into account in computing gross income;

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"(b) Deduction from gross income.

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per centum of the amount of such excess shall be a deduction from gross income. * * *" [26 U. S. C. (1952 ed.) § 117.]

would have us impose on the business community before we could say that a valid and binding sale had occurred. At the least, it would require businessmen to strike a hard bargain. But such was done here. The bank realized interest on its loan to Kaichen. Kaichen was compensated for his part in the transaction. Further, the trial commissioner's report indicates that Kaichen, when he purchased the annuity policy from Elsa Wineman, was acting in his individual capacity and not as the agent of any company or person. We are satisfied, after examining the record, of the correctness of that determination (finding 11).

More specifically, the Government urges that we view the instant case against the factual background present in *Lasky* v. *Comm'r*, 22 T. C. 13 (1954), dismissed 235 F. 2d 97 (1956), affirmed 352 U. S. 1027 (1957). In that case the taxpayer assigned his right in accrued royalties of $820,000 to United Artists for $805,000. A few days later United Artists released the right to Warner Brothers for $820,000, the amount of the accumulated royalties. The court rejected petitioner's claim that the receipts constituted capital gains, and held the amount received to be ordinary income. Prior to the assignment the taxpayer in *Lasky* could have collected the royalties at any time since they carried no maturity date with them. According to the Government's interpretation of that case, there was, therefore, no benefit derived by the taxpayer on the assignment, and such was the basis for the court's decision. Similarly here there was no benefit, argues the Government, derived by Wineman on the assignment of the annuity policy—as a matter of fact, assignment of the policy prior to maturity cost Wineman the difference between the maturity value and the sales price, i. e., $330.14. But assuming the Government's interpretation of the holding in *Lasky* is correct, it cannot be said that Wineman derived no benefit from the assignment of the annuity contract. For, as mentioned above, a business purpose guided Andrew Wineman in his initial determination to dispose of the policy: the proceeds

of such disposition were to be invested in securities yielding a higher rate of return. His *method* of disposition, however, in electing to sell the policy to a third person rather than surrender it to the issuing company for its cash surrender value was clearly designed to lessen his taxes.[2] But such is the legal right of a taxpayer. *Gregory* v. *Helvering*, 293 U. S. 465 (1935); *Comm'r* v. *Tower*, 327 U. S. 280 (1946).

Finally, we have no quarrel with the Government's assertion that substance rather than form determines the tax consequences of a given transaction. We have examined the "substance" of this case and find ourselves in agreement with a statement made by counsel for plaintiffs: in the present case the form of the transaction fully disclosed its substance.

The second objection raised by defendant calls for more detailed analysis. It would require us to treat the gain realized on the transaction as ordinary income rather than as capital gain. As already indicated, Andrew Wineman made an initial payment of $10,000 on the contract at the time of purchase. Following the assignment of the policy to his wife, Elsa Wineman made various deposits in variable amounts on the contract. The last payment was made on March 4, 1949. At that time the total payments aggregated $81,000—the cost basis of the contract for tax purposes. The cash surrender value of the policy on its maturity date of January 6, 1951, amounted to $117,330.14. Of this sum, $330.14 represented the fee of the National Bank of Detroit and Kaichen for their part in the transaction. The balance of the proceeds, measured by the consideration paid for assignment of the contract, was received by Elsa Wineman. The difference between the amount received and the cost

[2] Had the taxpayer here surrendered the policy to the insurer the gain would have been taxable as ordinary income. *Avery* v. *Comm'r*, 111 F. 2d 19 (1940); *Bodine* v. *Comm'r*, 103 F. 2d 982 (1939).

basis of the annuity contract, i. e., $36,000, is the amount we are now asked to treat as ordinary income.

Counsel for the Government in oral argument directed our attention to the table under Section 5 of the annuity contract wherein is specified the death benefits and the loan or cash values of the policy prior to commencement of the life income payments. As his computations based on that table indicate, amounts deposited under the contract accumulate at 3½ percent interest compounded annually. Thus, the contract's rate of return is fixed. Bearing this fact in mind, the error becomes apparent in plaintiff's basic assertion that the gain realized by Elsa Wineman from the sale of the annuity policy is no different from the gain realized from the sale of corporate stock which has increased in value because of earnings accumulated and retained by the corporation over the period the stock was held by the taxpayer. Certainly it cannot be said that the enhancement in value of corporate stock, affected as it is by a myriad of economic factors, bears any material resemblance to the predictable growth in value of an annuity policy.

Looking to the taxing provision of the Internal Revenue Code of 1939 that would become operative upon maturity of the policy and commencement of the life income payments thereunder, it is to be seen that whether such payments would have been treated under section 22 (b) (2) as amounts received under an endowment contract or as amounts received as an annuity and therefore subject to the 3 percent rule would make no difference in treatment as to the nature of the gain realized under the policy.[3]

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[3] Internal Revenue Code of 1939:

"§ 22. Gross income—(a) General definition.

. . . . . .

"(b) Exclusions from gross income.

"The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

Essentially, either method of taxation subjects gain under the policy to ordinary income treatment.

This being so, the issue here becomes one of whether plaintiffs can convert what would in time constitute ordinary income under section 22 (b) (2) into capital gain.

Courts have had occasion to pass upon the broader question of whether future income may be converted into capital gain a number of times. Moreover, the variety of transactions which have thereby been subjected to judicial review and the uniformity of decisions which have followed amply support the Government's position in this case.

The problem was considered in *Helvering* v. *Smith*, 90 F. 2d 590 (1937), where a retiring partner sought to treat as capital gain the proceeds from the "sale" of his interest in the earned fees of a partnership, both billed and unbilled, to the remaining partners. The court there refused to adopt the taxpayer's argument, emphasizing that as the partnership accounts were received they would constitute ordinary income. In the court's opinion, the "purchase" of that future income did not turn it into capital

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"(2) [as amended by sec. 120 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] Annuities, etc.

"(A) In general.

"Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *" [26 U. S. C. (1952 ed.) § 117.]

any more than the discount of a note received in consideration of personal services.

Cases following have employed the same rationale. Thus in *Rhodes' Estate* v. *Comm'r*, 131 F. 2d 50 (1942), the taxpayer was denied capital gain treatment as to declared dividends on stock held by him when those dividends were sold to a third party shortly before they became payable. In *Fisher* v. *Comm'r*, 209 F. 2d 513 (1954), the court held that the consideration received upon the sale of a corporation's notes which were in default both as to principal and interest was taxable as ordinary income, and not as capital gain, to the extent that the payment received exceeded the face value of the notes. And in *Sorensen* v. *Comm'r*, 22 T. C. 321 (1954), an opinion reviewed by the full court, the Tax Court held that stock options which were granted as compensation by the taxpayer's employer gave rise to ordinary income upon their sale, and not capital gain as taxpayer contended.

The recent Supreme Court decision in *Comm'r* v. *P. G. Lake, Inc., et al.*, 356 U. S. 260 (1958), sheds additional light on this area. Under review in that case were oil payment rights, and in one instance a sulphur payment right, which were assigned by the taxpayers for present considerations. The Court held that the amounts received for the assignments were taxable as ordinary income, subject to a depletion deduction, and not as long-term capital gains. Plaintiffs, however, urge a distinction as to the *P. G. Lake* case, saying that it is in accord with the long line of established authority which holds that a taxpayer cannot assign future income to another and thus himself escape the tax on that income. But here, plaintiffs contend, Elsa Wineman was not selling or assigning only future income: she sold her entire ownership in an income-producing capital asset and thereby relinquished forever all rights thereto. In answer to plaintiffs on this point, we are unable to agree that a transfer of the entire asset is

dispositive of the case. Actually the law holds no certainty in this area, but the Supreme Court has indicated that the concept of "property" is not necessarily controlling in matters of taxation. In *Hort* v. *Comm'r*, 313 U. S. 28 (1941), the Court held that a sum received by a lessor for the cancellation of a lease was taxable as ordinary income despite the fact that the lease may for other purposes be treated as "property" or "capital". Since plaintiffs' asserted distinction is inconsistent with the principle of the *Hort* decision, we see no reason to adopt it.

This court is satisfied, after reviewing the above authorities, that the realized gain under the annuity contract in question should not be accorded capital gain treatment under section 117 of the Internal Revenue Code of 1939, but is properly taxable as ordinary income.[4]

The petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Wilson Cowen, and the briefs and argument of counsel, makes findings of fact as follows:

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[4] Of the $117,330.14 paid by the Penn Mutual Life Insurance Company upon surrender of the policy, $521.38 represented accumulated dividends and $329.02 represented interest on those dividends. Whether the dividends were paid out of earnings and therefore taxable when received, G. C. M. 10798, XI-2 Cum. Bull. 58, *Florence Mae Shelley*, 10 T. C. 44, or were merely rebates on premiums, and therefore not taxable under Treasury Regulations 111, Sec. 29.22 (a)-12 does not affect the result of this case. Thus if they are true dividends they are taxable for the year received (1951). But if they are rebates on premiums they are treated as a return of capital and thereby serve to reduce the taxpayer's cost basis. Hence, even though there is a reduction of the cost basis of the annuity, the taxpayer's gain is exactly the same as if the dividends were taxable.

1. Plaintiffs, Eugene J. Arnfeld and Henry J. Moses, are executors of the Estate of Andrew Wineman, deceased. Plaintiffs Eugene J. Arnfeld and Mortimer H. Meyer are executors of the Estate of Elsa Wineman, deceased.

2. On January 6, 1933, Andrew Wineman, who resided in Detroit, Michigan, where he was engaged in business, purchased an annuity insurance contract from the Penn Mutual Life Insurance Company. At the time of the purchase, Wineman made an initial payment of $10,000 on it. The policy was an 18-year optional deferred income contract maturing when the insured attained the age of seventy years and carried a variable deposit rider which permitted deposits at any time by the insured or his assignees of any desired amounts not to exceed $100,000, unless such limit was waived by the company. The maturity date of the annuity contract was January 6, 1951.

3. On January 11, 1933, Andrew Wineman assigned the policy to his wife, Elsa Wineman.

4. The annuity insurance contract was sold to Andrew Wineman by Howard A. Kaichen, who is and for approximately twenty-six years has been a life insurance broker in Detroit, Michigan. At the time the policy was issued, he was licensed by the State of Michigan and held general agency contracts with several life insurance companies, including the Penn Mutual Life Insurance Company. Kaichen's contract with the Penn Mutual Life Insurance Company was in force from 1932 to 1941 when it was terminated. Thereafter, Kaichen had no connection with that company. During the years 1950 and 1951, Kaichen was self-employed as a life insurance broker. In 1932 and 1933, financial conditions in Detroit were very bad. Persons who had invested in stocks, bonds, and real estate realized that such investments were not as secure or as reliable as at the time the investments were made. In order to provide a conservative investment for such persons, the Penn Mutual Life Insurance Company and other

insurance companies evolved an optional deferred income policy of the kind which was purchased by Wineman. The advantages of this type of policy were first brought to Wineman's attention by Kaichen during the latter part of 1932 and, as already stated, the policy was issued on January 6, 1933.

5. In the inflationary period which followed World War II, the conservative investment provided by the above-described annuity policy became less attractive by comparison with other investments. As a result, Wineman frequently complained that Kaichen had induced him to make a poor investment. After repeatedly hearing such criticism, Kaichen suggested that the annuity policy should be sold and the proceeds invested in common stocks or other securities yielding a higher rate of return. The suggestion that the policy be sold rather than surrendered to the issuing company for the cash surrender value originated with Kaichen and was based upon his belief that such a disposition of the policy would result in an income tax saving. Upon Kaichen's advice that the income tax consequences of such a sale should be considered by a more competent source, Wineman consulted Lybrand, Ross Bros. & Montgomery, a public accounting firm which was regularly employed by Wineman in his business. The Detroit office of the accounting firm took the matter up with its Washington, D. C., office. As a result, Wineman was advised by his accountants that if a bona fide sale of the policy were made, the Treasury Department would treat any profit derived therefrom as long-term capital gain instead of as ordinary income.

6. Since he had no thought of purchasing the annuity policy personally, Kaichen suggested that it be sold to the National Bank of Detroit. On January 3, 1951, Wineman and Kaichen visited the bank for the purpose of disposing of the policy. They were not accompanied by Mrs. Wineman who was ill at the time. After an examination of the

policy, the vice president of the bank stated that since the National Bank of Detroit was a national bank, it was precluded by law from making the purchase. However, he suggested that Kaichen buy the policy and said that the bank would loan $117,000, the agreed selling price, on Kaichen's personal note, with the policy attached as collateral.

7. On January 3, 1951, Elsa Wineman transferred the annuity policy acquired by her on January 11, 1933, to Howard A. Kaichen, at the agreed price of $117,000. In order to pay for the policy, Kaichen borrowed $117,000 on his personal note from the National Bank of Detroit on January 4, 1951, and on the same day assigned the annuity contract to the bank as collateral for the loan. When he signed the note, the bank issued a deposit slip showing that the sum of $117,000 was deposited to Kaichen's special account on January 4, 1951. Kaichen and his wife had a joint checking account in the bank and, in addition, he had maintained a special account there since 1948 for the purpose of depositing any funds which he received from investments. At the time of the deposit of January 4, 1951, he had a balance of more than $5,000 in the special account. He had previously borrowed money from the bank but up to January 4, 1951, the largest loan he had obtained was in the amount of approximately $13,000.

8. On January 4, 1951, the National Bank of Detroit mailed the annuity policy to the Penn Mutual Life Insurance Company, along with a letter reading as follows:

> We hand you herewith Optional Deferred Income Policy No. 1727338 issued by you to Andrew Wineman, which policy was assigned by Andrew Wineman to Mrs. Elsa Wineman, an absolute assignment of said policy from Else [sic] Wineman to Howard A. Kaichen and a collateral assignment from Howard A. Kaichen to National Bank of Detroit.

We understand that the cash surrender value of said policy is $117,330.14 and we hereby surrender said policy to you with the request that the cash surrender value of said policy be forwarded to the National Bank of Detroit.

This letter is also signed by Mr. Howard A. Kaichen as owner and assignee for the purpose of confirming the instructions herein contained and for the purpose of evidencing his consent thereto.

9. On January 5, 1951, Kaichen issued his check to Elsa Wineman for $117,000, the amount he had agreed to pay her for the insurance policy.

10. On January 15, 1951, the National Bank of Detroit received $117,330.14, the cash surrender value of the policy from the Penn Mutual Life Insurance Company.[3] On the same date, the bank issued a deposit slip to Howard A. Kaichen showing that the sum of $117,089.37, representing the amount of his note to the bank, plus accrued interest, had been deducted from the total proceeds received from the insurance company and that his special account had been credited with the net sum of $240.77. This amount was reported by Kaichen in his tax return as income received in 1951.

11. When he purchased the annuity policy from Elsa Wineman, Kaichen was acting in his individual capacity and not as the agent of any company or person.

12. On January 4, 1951, Andrew Wineman was aware of the fact that Kaichen was making a profit of $240.77 upon the transaction and rasied an objection on that account. However, he waived his objection upon assurance from the vice president of the bank that Kaichen was entitled to

[3] Of the $117,330.14 cash surrender value of the policy, the sum of $521.38 represented accumulated dividends. Interest on those dividends was represented in the amount of $329.02.

earn a profit for the part he performed in the disposition of the policy.

13. After the initial payment of $10,000 on the annuity contract on the date of purchase, January 6, 1933, additional deposits in variable amounts were made by Elsa Wineman. The last payment was made March 4, 1949, at which time the total payments aggregated $81,000. At the time Elsa Wineman transferred the annuity contract to Howard A. Kaichen, her cost basis of the said contract was $81,000.

14. The amounts set forth in tabular form in section 2, "TABLE OF AMOUNTS OF MONTHLY LIFE INCOME PAYMENTS PURCHASED BY DEPOSITS", and section 5, "DEATH BENEFITS AND LOAN OR CASH VALUES PRIOR TO COMMENCEMENT OF LIFE INCOME PAYMENTS", of the annuity contract indicate that amounts deposited under the contract accumulate at 3½ percent interest compounded annually during the life of the policy.

15. Andrew Wineman and his wife, Elsa, filed a joint income tax return for the calendar year 1951 and paid the tax reported therein in the amount of $181,443.33. In the return, the sum of $36,000, representing the difference between the cost of the policy and the $117,000 received from Howard A. Kaichen for the transfer of the policy, was reported as capital gain. Subsequently, the Commissioner of Internal Revenue made a final determination that the taxpayers were liable for additional income taxes for 1951 in the amount of $23,137.23 plus interest, which was paid on October 27, 1953, December 15, 1954, and February 9, 1955. This determination resulted from the Commissioner's treatment of the $36,000 as ordinary income instead of capital gain.

16. Elsa Wineman died in 1952 and Andrew Wineman died in 1954. By order of the Probate Court of Wayne County, Michigan, dated December 2, 1954, Eugene J.

Arnfeld and Mortimer H. Meyer were appointed executors of the Estate of Elsa Wineman. By order of the same court dated January 10, 1955, Eugene J. Arnfeld and Henry J. Moses were appointed executors of the Estate of Andrew Wineman.

17. On April 7, 1954, Andrew Wineman filed a claim for the refund of $23,487.69 of 1951 income taxes and interest paid by him and his wife. On April 22, 1955, plaintiffs filed a second claim for the refund of $25,494.25 of 1951 income taxes and interest paid by Andrew and Elsa Wineman. The second claim for refund includes additional payments of 1951 income tax and interest in the amount of $1,909.34. Each of the claims for refund was based on the contention that the $36,000 profit realized by Elsa Wineman in the calendar year of 1951 from the sale of the annuity insurance policy constituted capital gain, whereas the Commissioner of Internal Revenue had assessed the 1951 income taxes upon the basis of his determination that such profit constituted ordinary income.

18. The second claim for a refund was rejected on February 1, 1956, in a notice sent by registered mail.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

APPENDIX II

Statutes and Regulation Involved

Internal Revenue Code of 1939:

Section 117(a)(1)—

(a) DEFINITIONS.—As used in this chapter—

(1) CAPITAL ASSETS.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), or real property used in his trade or business;

(C) a copyright; a literary, musical, or artistic composition; or similar property;

* * * * * * *

(D) an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue.

Section 117(a)(4)—

LONG-TERM CAPITAL GAIN.—The term "long-term capital gain" means gain from the sale or exchange

of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

Section 117(b)—

DEDUCTION FROM GROSS INCOME.—In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per centum of the amount of such excess shall be a deduction from gross income. . . .

TREASURY REGULATIONS 111, Sec. 29.117-1.

The term "capital assets" includes all classes of property not specifically excluded by section 117(a)(1).